Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

ANTHONY KEITH JOHNSON,

Petitioner,

v.

JOHN E. NAGLE, WARDEN, AND
THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

(1) Whether the failure of counsel, who otherwise participated in their client's defense, to litigate the single issue determinative of their client's guilt or innocence of a capital offense constitutes such a failure "to subject the prosecution's case to meaningful adversarial testing" as to raise a presumption of prejudice to their client under *United States* v. *Cronic*, 466 U.S. 648 (1984).

(2) Whether, contrary to the decision of the court below and two other courts of appeals but in accordance with the decisions of five courts of appeals, the cumulative effect of trial counsel's acts and omissions must be evaluated in determining whether their representation was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

(3) Whether a defendant's constitutional right under *Beck* v. *Alabama,* 447 U.S. 625 (1981), to have the jury instructed on a lesser-included offense as a viable alternative to a charge of capital murder, when the record supports such a charge, is overcome by a presumption that the jury acted rationally in convicting the defendant on the capital charge.

(4) Whether the State's suppression of a police report stating that two men other than the defendant "did the shooting" violated defendant's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles* v. *Whitley*, 514 U.S. 419 (1995), when such information contradicted the State's claim that the defendant had participated in the shooting and the presence of others at the crime scene was critical to the jury's determination whether the defendant possessed the specific intent to kill requisite for a capital murder conviction.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Keith Johnson prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit affirming the denial of his petition for habeas corpus in this death penalty case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 256 F.3d 1156 and is reproduced in the separately bound Appendix filed herewith (App. A, pp. 1a-61a.) The opinion of the district court is reported at 58 F. Supp.2d 1303 (App. B, pp. 62a-225a.) An order of the Alabama Court of Criminal Appeals dismissing petitioner's state petition for a writ of habeas corpus is reported at 612 So.2d 1288 (App. D, pp. 227a-61a.) The order of the Alabama Supreme Court denying Johnson's state petition for writ of certiorari is reported at 1993 Ala. LEXIS 303 (App. C, p. 226a).

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2001. (App. A.) A timely petition for rehearing was denied on September 14, 2001. (App. H). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution reads in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without Due Process of law...

The Sixth Amendment reads in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defen[s]e.

STATEMENT OF THE CASE

Petitioner Anthony Keith Johnson was convicted of "[i]ntentionally caus[ing] the death of Kenneth Cantrell by shooting him with a pistol" while attempting to commit a robbery at the Cantrell home. The State contended at trial that Johnson actually killed Cantrell as the indictment charged, and the Alabama Court of Criminal Appeals affirmed Johnson's conviction that basis. (*See* App. G, pp. 266a-67a, 281a-82a.) The State has now conceded that Johnson did not kill the victim. The record, however, left no doubt that Johnson was present at the attempted robbery. A bullet containing glass fragments that matched a window pane in the victim's carport door was extracted from Johnson's back.

With Johnson's presence nearby during the shootout with the victim established, the only issue for the jury was whether he possessed the specific intent necessary under Alabama law for a capital murder conviction as an accomplice. However, Johnson's trial counsel, Joseph Propst and Thomas DiGiulian, made no effort to litigate the intent issue. "[C]ounsel simply did not think much about the intent issue at all." (App. B, p. 123a.)

After a three-day trial, the jury convicted Johnson of capital murder. The jury voted 9 to 3 against the death penalty. The trial judge, however, overrode the jury's recommendation and sentenced Johnson to death. The conviction was affirmed on appeal (App. G), and this Court denied Johnson's petition for certiorari, 488 U.S. 876.

A. Evidence at Trial.[1]

Cantrell ran a jewelry business from his home. Mrs. Cantrell, the only eyewitness to the crime and the first witness called to the stand, testified that in March of 1984, two men entered the Cantrell home through an exterior door that gave on the couple's carport, one of the men yelled "this is a holdup," and her husband and at least the first man through the door exchanged gunshots. Cantrell was struck by six .32 caliber bullets fired by the first intruder. When Johnson was arrested in a motel room a few days after the

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[1] Unless otherwise indicated, the statement of facts set forth herein can be found in the Eleventh Circuit's opinion. (App. A.) Citations to hearings held in February and March 1996 pursuant to Johnson's federal habeas petition are cited as "Habeas Tr. (date) at [ ]." Citations to the record of the state post-conviction proceedings are cited as "R20 at [ ]." Citations to the trial transcript are cited as "Tr. at [ ]." Citations to the pre-trial hearing are cited as "PH at [ ]."

murder, there was a .357 magnum handgun in his room. The State was unable to match any of the bullets found at the crime scene to that gun.

The State now concedes that Johnson was not the first intruder and thus that he was not the man who killed Cantrell. (R20 at 503-04.) Mrs. Cantrell's testimony and additional evidence at trial support a conclusion that Johnson was not the second intruder either, but rather a third man who was outside the house when the shootout took place. Mrs. Cantrell testified that she saw the second intruder as he approached the carport door and that he wore a brown cap. Mrs. Cantrell declined to identify Johnson as one of the intruders during pre-trial proceedings (PH at 57-58), and the defense did not ask Mrs. Cantrell at trial whether she could identify Johnson. Understandably, neither did the State. A State expert witness testified that the hair discovered in a brown cap that the police found at the scene (matching the one Mrs. Cantrell testified was worn by the second intruder) did not come from Johnson.

Mrs. Cantrell further testified that, after the exchange of gunfire, the first intruder called, apparently to a third man who was standing outside the carport door, "Come on in, Bubba . . . we have got him." The original two intruders then began moving from inside the house toward the carport door. According to Mrs. Cantrell, before they reached the door, Cantrell fired one last shot. The forensic evidence showed that Cantrell's final shot passed through a pane of glass in the carport door and struck Johnson, which is consistent with Johnson's having been "Bubba" and thus only a bystander during the shootout, guilty at most of felony murder, a non-capital crime.

B. Performance of Trial Counsel.

Under Alabama law, "a non-triggerman accomplice" can be convicted of capital murder "*if, but only if*, the defendant was an accomplice in the intentional killing as opposed to being merely an accomplice in the underlying felony." *Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982) (emphasis added); Ala. Code, § 13-A-5-40(a)(2) (1975). The State therefore could not rely on the felony murder doctrine to convict Johnson of capital murder. *See Lewis* v. *State*, 456 So. 2d 413, 416 (Ala. Crim. App. 1984). Proof of complicity in the underlying felony without more is not proof of the required intentional complicity in the killing.

Because Johnson had the victim's bullet in his back, the only real issue for jury determination was whether, as a non-triggerman accomplice, he possessed the requisite intent to kill Cantrell. Johnson's trial counsel, however, failed entirely to litigate this issue. This failure manifested itself in several ways, infecting all aspects of Johnson's remarkably brief trial.[2] For example, although counsel were aware at least two or three weeks before trial that the State's expert would testify that there was a 96 percent probability that the glass fragments on the bullet in Johnson's back came from Cantrell's carport door, counsel testified that their strategy was only to challenge the proof that Johnson had been at the Cantrell home on the night of the shooting.[3] (Evidence of

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[2] Of the three trial days, the last two focused almost entirely on chain of custody testimony.

[3] Without explanation or citation to the record, the Eleventh Circuit states in a footnote that counsel did not learn of the State's evidence concerning the glass fragments until the "eve" of trial. (App. A, p. 33a.) There is no support for such a characterization of counsel's knowledge.

that strategy or any considered defense strategy is impossible to discern from the trial record.) Counsel acknowledged that the chances of success on the line of defense they purported to follow were "very dim." (R20 at 632.)

Moreover, although Johnson's counsel knew that more than two men were at the scene (*see* App. B, p. 109a n.20), they made no attempt to develop this fact either through direct testimony or cross-examination of the State's witnesses. Production of evidence that other men were present at the scene would have provided powerful support for an argument that Johnson was the third man, standing outside during the shooting and thus not sharing the gunman's intent to kill Cantrell. Other evidence whose significance was never explained to or urged upon the jury would have added to the force of the argument: the evidence that Johnson was hit by Cantrell's last shot while outside the carport door, the evidence that the two men involved in the shootout were still in the house when Johnson was hit by this shot, the forensic evidence that Johnson had not worn the brown cap worn by the second intruder, and, most compelling, Mrs. Cantrell's testimony that a third man had been called into the house after the shootout ended. As the district court found, however, counsel did not recognize the significance of Mrs. Cantrell's testimony and made no effort to pursue its exculpatory implications for their client, despite the fact that a "crucial portion" of that testimony was elicited during defense counsel's own examination of Mrs. Cantrell. (*Id.* at 107a-08a, 123a.)

Further, counsel did not request an instruction on felony murder, the only instruction that would have permitted a jury which rationally believed that the evidence showed a robbery in which Johnson played a part, and a killing that he did not intend, to record that finding. In fact, counsel acquiesced in the State's representation to the trial court that felony murder had no role in Johnson's trial (Tr. at 53-55),

and admitted that requesting a felony murder charge "never crossed their minds." (Habeas Tr. (Feb. 29, 1996) at 69.)

Finally, nowhere in counsel DiGiulian's 55-page closing argument did he assert that the State had failed to prove Johnson had the specific intent to kill Cantrell, even though he framed his closing by stating that "the State has the duty to prove to you beyond a reasonable doubt ... every circumstance, necessary to show that Keith is guilty. They can't prove — if there is eighteen circumstances they have to prove, if they prove seventeen they haven't done their job." (Tr. at 770.) Even allowing for the strategy that they professed to have adopted, there was no reason for counsel not to have argued the evidence and want of evidence that would have permitted the jury to find that the missing eighteenth circumstance in this case was Johnson's intentional participation in the killing of Cantrell.

Defense counsel apparently failed to make this argument and neglected the key evidence that would have supported it because they did not comprehend the distinction between capital murder and traditional felony murder under Alabama law. As counsel Propst testified, "You know, we looked at it like, if he was there and they all went there to rob the man and the man got killed, he is just as guilty as anybody." (Habeas Tr. (Mar. 20, 1996) at 35.) DiGiulian reflected the same misunderstanding of the law when he told the jury in the concluding sentences of his closing argument that to find that Johnson was guilty of capital murder it had to find that Johnson had been "out there." (Tr. at 820.) The district court — which thought that, despite what he said and left unsaid in his closing and although it found his testimony on the point "ambiguous," DiGiulian may have understood the law (App. B, pp. 120a-23a & n.27) — nevertheless found that "counsel simply did not think much about the intent issue at all." (*Id.* at 123a.)

C. State Collateral Review.

Petitioner's direct appeal from his conviction was perfunctory, handled by counsel different from his trial counsel but whose performance itself gave rise to a substantial claim of ineffective representation. In April 1989, Johnson commenced post-conviction proceedings through his present counsel in the Circuit Court of Morgan County pursuant to the then-applicable Rule 20 (now Rule 32) of the Alabama Rules of Criminal Procedure. During these proceedings, the State responded to Johnson's discovery requests by producing for the first time a report prepared by the Alabama Bureau of Investigation of its investigation of the Cantrell murder ("the ABI Report"), in which trial witness Sergeant Newell noted that an informant had told authorities that Garland and Wayne McCulloch "*did the shooting*" at the Cantrell home.

After conducting an evidentiary hearing on trial counsel's ineffectiveness, the court issued a one-and-a-half page order that simply listed fifteen of Johnson's claims and designated them as without merit or procedurally barred or both. (App. E.) In September 1992, the Alabama Court of Criminal Appeals affirmed. (App. D.) Johnson's petition for rehearing was denied and the Alabama Supreme Court denied Johnson's petition for writ of certiorari. (App. C.)

D. Proceedings on the Federal Habeas Petition.

In June 1993, Johnson filed his (pre-Antiterrorism and Effective Death Penalty Act) petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama alleging that, *inter alia*, trial counsel, by failing to litigate the key issue of intent, failed to subject the State's case to "meaningful adversarial testing" within the meaning of *United States* v. *Cronic*, 466 U.S. 648 (1984); trial counsel rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984); the failure to instruct

the jury on felony murder violated *Beck* v. *Alabama*, 447 U.S. 625 (1981); and the State's suppression of the ABI Report violated *Brady v. Maryland*, 373 U.S. 83 (1963). In July 1999, the district court denied Johnson's petition. (App. B.)

Although Johnson's claim that "his counsel failed to seize upon the available factual and legal arguments to negate one of the elements of the crime he was charged with" was a "serious" allegation, the district court concluded that he was not eligible for a presumption of prejudice under *Cronic* because his claim did not "involv[e] a complete failure to advocate for the client." (*Id.* at 127a.)

The district court further found that none of counsel's acts considered individually resulted in a violation of *Strickland*. The court expressly rejected Johnson's claim that trial counsel's actions should be viewed collectively to determine whether their representation had been deficient and whether Johnson had suffered prejudice as a result, deriding the argument as a "volume discount theory." (*Id.* at 155a.)

Although the district court acknowledged that a felony murder instruction would have fit the facts of the case (*Id.* at 145a), the court also rejected Johnson's claim that he was constitutionally entitled to such a charge under *Beck* and *Schad* v. *Arizona*, 501 U.S. 624, 648 (1991), stating that the "pragmatic, psychological approach underlying" those decisions was "in tension" with *Strickland*'s requirements. (*Id.* at 147a n.38.) The court concluded that it was bound by "*Strickland*'s mandate" and "must therefore leave the fine adjustment of the law in this area to a higher authority." (*Id.*)

Finally, the court rejected Johnson's *Brady* claim on the ground that mere "evidence that people other than Johnson were involved in the robbery" was not material. (*Id.* at 185a.)

E. The Eleventh Circuit's Decision.

The Eleventh Circuit affirmed. The court dismissed Johnson's *Cronic* claim in a footnote on the ground that *Cronic* applies only to cases in which counsel "entirely fails to challenge the prosecution," not to cases in which counsel actively participated. (App. A, p. 47a n.17.) Consistent with circuit precedent,[4] the court of appeals did not consider whether trial counsel's challenged acts and omissions taken together constituted deficient performance under *Strickland*. Rather, the court addressed each of the challenged actions individually, dismissing each as either reasonable or non-prejudicial. (*See, e.g., id.* at 33a, 35a, 40a.)[5] The result was that the court never confronted the fact that, because counsel did not challenge the sufficiency of the State's proof of participation in the shooting, and did not argue the evidence indicating non-participation, the crucial issue of intent was never litigated.

Echoing the district court, the Eleventh Circuit rejected Johnson's *Beck* claim because the jury was instructed on intentional murder and robbery and because an instruction on felony murder "would not have changed the standard for conviction on capital murder" so that, for a jury presumed to be objective and rational, "an instruction on that offense should not have changed the outcome." (*Id.* at 39a.)

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[4] *See, e.g., Williamson* v. *Moore*, 221 F.3d 1177 (11th Cir. 2000) (analyzing defendant's claims individually, rather than collectively); *Waters* v. *Thomas*, 46 F.3d 1506, 1510-23 (11th Cir. 1995) (same).

[5] *See Kyles* v. *Whitley*, 514 U.S. 419, 440-41 (1995) (concluding that circuit court's piecemeal review of suppressed evidence indicated that it had failed to conduct the cumulative analysis required under *Brady*).

Finally, although the Eleventh Circuit rested its determination that counsel's failure to understand the significance of Mrs. Cantrell's testimony regarding the third man was excusable, in part, because before trial there was supposedly little evidence to support the theory that others had been present at Cantrell's home, the court concluded that the suppressed ABI Report was not material because it merely "identif[ied] additional participants" in the attempted robbery. (*Id.* at 53a.)

REASONS FOR GRANTING THE WRIT

This petition poses four important and substantial questions affecting the constitutional rights of criminal defendants that merit this Court's consideration in this death penalty case. Two of the questions relate to the defective performance of petitioner's trial counsel. On both of them there is a conflict among the circuits that the Court should resolve. Indeed, on the first question, this Court has just granted certiorari to review a conflicting decision of the Sixth Circuit concerning the reach of *Cronic*. The way the court below resolved the remaining two questions indicates a need for this Court to clarify the reach of two other of its major constitutional decisions.

I. THE ELEVENTH CIRCUIT'S HOLDING THAT *CRONIC* APPLIES ONLY WHEN COUNSEL "ENTIRELY FAILS TO CHALLENGE THE PROSECUTION" CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS

Johnson asserted that his trial counsel's failure to litigate, because they did not even "think about," the only real issue in his case — that of his intent to kill — constituted a violation of *United States* v. *Cronic*, 466 U.S. 648 (1984).

Under *Cronic*, the Sixth Amendment is violated and the result of the trial is "presumptively unreliable" when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. The court of appeals dismissed Johnson's *Cronic* claim in a footnote, concluding that Johnson "plainly was not entitled to relief" because *Cronic* applies only "when counsel 'entirely' fails to challenge the prosecution, and that is indisputably not so here." (App. A, p. 47a n.17.)

The Eleventh Circuit's opinion is in direct conflict with the Sixth Circuit's decision in *Cone* v. *Bell*, 243 F.3d 961 (6th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3164 (U.S. Dec. 10, 2001) (No. 01-400), in which this Court granted a writ of certiorari just three days ago. In *Cone*, the court of appeals held that trial counsel's failure to put on any evidence during the sentencing phase of a death penalty case "was not 'strategic' representation," but "nonrepresentation of the most deadly sort." *Id.* at 979. As a result of counsel's failure to litigate the sentencing issue, "the prosecutor's insistence that justice required that Cone be put to death was not subjected to 'meaningful adversarial testing.'" *Id.* (citation omitted). That was true even though counsel had litigated most vigorously the prosecution's case for conviction. The court concluded that "under *Cronic*, a presumption of prejudice is raised by counsel's behavior." *Id.* The Sixth Circuit rejected the state's argument, mirroring the holding of the court of appeals in this case, that *Cronic* does not extend to cases in which counsel "actively defended the accused at trial." *See* State's Petition for Certiorari, *Bell* v. *Cone*, Sup. Ct. No. 01-400, at p. 18. The Eleventh Circuit held to the contrary when it said that *Cronic* applies only when "counsel entirely fails to challenge the prosecution."

The Eleventh Circuit's opinion here also conflicts with decisions of the Ninth and Tenth Circuits, which hold that *Cronic*'s presumption of prejudice applies to counsel's complete failure to litigate an issue critical to the outcome of

the defendant's case. *See Osborne* v. *Shillinger*, 861 F.2d 612 (10th Cir. 1988) (finding *per se* prejudice when counsel, during sentencing phase, intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming and made statements to the press that his client had no evidence to support his claims); *United States* v. *Swanson*, 943 F.2d 1070 (9th Cir. 1991) (presuming prejudice when counsel admitted in closing argument that there was no reasonable doubt regarding "the only factual issues in dispute"); *but see Scarpa* v. *Dubois*, 38 F.3d 1, 13 n.7 (1st Cir. 1994) (distinguishing between "inept performance" analyzed under *Strickland*, and "no performance" analyzed under *Cronic*); *Woodward* v. *Collins*, 898 F.2d 1027, 1028 (5th Cir. 1990) (*Strickland* applies to "bad lawyering," while *Cronic* reaches only "no lawyering").

The Sixth, Ninth and Tenth Circuits are correct in holding that *Cronic* does not require that counsel play no role whatever in defense of his or her client to warrant a presumption of prejudice. Rather, *Cronic* requires that counsel "entirely fail to subject the prosecution's case to meaningful adversarial testing." The failure of Johnson's counsel to litigate the only fact issue in this death penalty case satisfies that requirement. The contrary decision below should be reviewed along with *Bell* v. *Cone* to resolve the circuit conflict because this case complements that decision, which concerns counsel's failure to defend against the imposition of the death penalty; this case concerns counsel's failure to defend against a conviction that made their client eligible for the death penalty.

II. THE COURTS OF APPEALS ARE IN CONFLICT OVER WHETHER *STRICKLAND* v. *WASHINGTON* REQUIRES A CUMULATIVE EVALUATION OF COUNSEL'S PERFORMANCE

Petitioner pointed to a series of serious mistakes on the part of trial counsel and argued that each, taken singly, amounted to ineffective assistance depriving Johnson of a fair trial and, in addition, that taken together they constituted a total failure to litigate the one true issue in his case. He was obviously prejudiced by this failure and thus, he argued, satisfied the standard of *Strickland* for determining when ineffectiveness of counsel results in denial of his Sixth Amendment right to counsel. The court of appeals analyzed each of the alleged derelictions separately, finding a supposed tactical decision here, a constraint imposed by the defendant's confidences there,[6] a substitute for an alleged omission here, a want of prejudice there. It engaged in no analysis of the cumulative effect of the derelictions.[7] In

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[6] The court of appeals concluded that trial counsel's failure to recognize the significance of Mrs. Cantrell's testimony did not violate *Strickland* because counsel's supposed alternative "strategy" of arguing Johnson was not at the Cantrell home was reasonable in light of privileged communications between Johnson and his trial attorneys. (App. A, pp. 28a-33a & n.10.) Testifying at post-conviction proceedings, counsel said that *none* of the decisions challenged by Johnson rested on information provided to them by their client. (Habeas Tr. (Mar. 20, 1996) at 31-32, 36-37, 41-43, 48 (Propst); *id.* at 58-59, 66, 68-71, 75 (DiGiulian).)

[7] In its footnote dismissing Johnson's claim under *Cronic*, the court described Johnson's claim as follows: "his counsel's errors, viewed in the aggregate, constitute

proceeding thus, the court aligned itself with the Fourth and Eighth Circuits. *See Fisher* v. *Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998); *Wainright* v. *Lockhart*, 80 F.2d 1226, 1233 (8th Cir. 1996); *Leary* v. *Garraghty*, 155 F. Supp.2d 568, 577 (E.D. Va. 2001) (relying on district court's decision in this case, and *Fisher* v. *Angelone,* for proposition that cumulative review does not apply in analyzing counsel's performance under *Strickland*).

The Eleventh Circuit's piecemeal approach to assessing performance error is inconsistent with this Court's opinion in *Strickland*, and is in direct conflict with decisions of the Second, Fifth, Sixth, Seventh, and Ninth and (apparently) Tenth Circuits.[8] Such disarray among the

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prejudicial ineffectiveness of counsel even if none of those errors, standing alone, constitutes a *Strickland* violation." (App. A, p. 47a n.17.) The court thus distinguished between claims of ineffectiveness under *Strickland*, which it had reviewed "standing alone," with the aggregated appraisal required by the *Cronic* test.

[8] *See, e.g., Lindstadt* v. *Keane*, 239 F.3d 191, 199-204 (2d Cir. 2001); *Livingston* v. *Johnson*, 107 F.3d 297, 308-09 (5th Cir. 1997); *Blackburn* v. *Foltz*, 828 F.2d 1177, 1184 (6th Cir. 1987); *Crisp* v. *Duckworth*, 743 F.2d 580, 582-83 (7th Cir. 1984); *Williams* v. *Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994); *Stouffer* v. *Reynolds*, 168 F.3d 1155, 1162-65 (10th Cir. 1999).

The Tenth Circuit has issued inconsistent decisions with regard to the issue, both accepting and rejecting cumulative analysis of an attorney's alleged errors. *Compare Stouffer*, 168 F.3d at 1162-65, *with Castro* v. *Ward*, 138 F.3d 810, 832 (10th Cir. 1998), and *Jones* v. *Stotts*, 59 F.3d 143, 147 (10th Cir. 1995).

courts of appeals on a critical Sixth Amendment issue of broad applicability calls for this Court's review. *See* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W.L. Rev. 237, 247 (1995) (estimating approximately 45 percent of the federal habeas petitions filed by state prisoners allege ineffective assistance of counsel). This case presents the perfect vehicle for such a review. The result of this case is that the Eleventh Circuit has held that there was a fair trial even though the only fact issue in the case was never recognized by counsel and consequently not presented to the jury.

A. The Eleventh Circuit Decision Conflicts with Those of Several Other Courts of Appeals in Not Assessing Counsel's Performance Cumulatively.

The majority of the courts of appeals that have addressed the issue have held that counsel's alleged errors must be viewed in the aggregate to determine whether counsel's conduct was constitutionally deficient. The relevant decisions of six circuits are cited in footnote 8 above. For example, in *Stouffer* v. *Reynolds*, 168 F.3d 1155 (10th Cir. 1999), the defendant alleged not only that several "specific instances [of attorney conduct fell] below an objective standard of reasonableness," but that, when viewed collectively, these individual acts left the impression that defendant "had no viable defense." *Id.* at 1162. The Tenth Circuit concluded that "[t]aken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense." *Id.* at 1163-64.

Similarly, in *Lindstadt* v. *Keane*, 239 F.3d 191 (2d Cir. 2001), the Second Circuit examined four alleged errors by counsel. The court emphasized that "[w]e need not decide

whether one or another or less than all of these four errors would suffice [to show that defense counsel's conduct was outside the range of professionally competent assistance], because *Strickland* directs us to look at the totality of the evidence before the judge or jury." *Id.* at 199. The court explicitly acknowledged that at least two of the alleged errors would not, standing alone, demonstrate deficient performance. "But when they are added to the first two, the cumulative weight of the error convinces us that the ineffectiveness of counsel reached the constitutional threshold." *Id.* at 202. The court thus concluded (before proceeding to its prejudice analysis): "We assess the impact of these [alleged performance] errors in the *aggregate*. *See Strickland*, 466 U.S. at 695-96. In that light, counsel's services to Lindstadt fell 'outside the wide range of professionally competent assistance.' *Id.* at 690." *Id.* at 204 (emphasis in original).[9]

By refusing to analyze counsel's acts and omissions cumulatively, the Eleventh Circuit cast its lot with the Fourth and Eighth Circuits, which have rejected the majority

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[9] In *Crisp* v. *Duckworth*, 743 F.2d 580, 582-83 (7th Cir. 1984), the Seventh Circuit held that collectively a "multiplicity of allegedly incompetent acts and omissions" established that counsel had not rendered effective assistance. The court said that, though it examined "each example of incompetence individually, we must also consider their cumulative effect in the light of the circumstances." It explained the logic of that proposition: On the one hand, a series of errors by counsel may not call for reversal when the entire trial record is considered. On the other hand, and pertinent to this case, "even if individual acts or omissions are not so grievous as to merit a finding of incompetence, their cumulative effect may be substantial enough to meet the *Strickland* test [for deficient performance]."

approach described above. For example, in *Fisher* v. *Angelone*, 163 F.3d 835 (4th Cir. 1998), the court rejected the defendant's assertion that "the cumulative effect of counsel's individual actions denied him of a fair trial." "Having just determined that none of counsel's actions could be considered constitutional error, it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial." *Id.* at 852. Although the Fourth Circuit accepted that cumulative analysis applied under *Strickland*'s prejudice prong, it concluded that such an approach was not applicable to determine whether counsel's performance was deficient. *Id.* at 853 n.9.

Similarly, in *Wainright* v. *Lockhart*, 80 F.2d 1226 (8th Cir. 1996), the Eighth Circuit held that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation.... Neither the cumulative effect of trial errors nor the cumulative effect of attorney errors are grounds for habeas relief." *Id.* at 1233. [10]

B. *Strickland* Requires a Cumulative Appraisal of Counsel's Performance and Its Impact.

The approach adopted by the majority of the courts of appeals is required by *Strickland*. In that case, this Court set out the criteria that determine when a defendant is entitled to relief because of incompetent representation. Guided by the purpose of the Sixth Amendment "to ensure a fair trial," the Court set forth a two-prong test for deciding "whether

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[10] Despite *Stouffer*, the Tenth Circuit has also endorsed this reasoning on at least two occasions. *See supra* note 8.

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

First, the defendant must show deficient performance falling "below an objective standard of reasonableness." *Id.* at 680. The Court emphasized that the ultimate touchstone for the inquiry under the first prong of its newly articulated test was whether counsel's "assistance" or "performance" was deficient "considering all the circumstances." *Id.* at 688. Thus, although the defendant is required to identify specific "acts and omissions of counsel that are alleged not to have been the result of reasonable professional judgment," the Court stressed that, in making the performance determination, the reviewing "court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case." *Id.* at 689-90.

That this determination requires, at least in most cases, an overall assessment of counsel's performance at trial was made clear, if *Strickland* left any doubt, in *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986). There the Court said, "It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that a counsel rendered reasonable professional assistance." *Id.* at 386 (citations omitted).

In addition to proving deficient performance, *Strickland* requires a defendant to show that he or she was prejudiced by counsel's incompetency. 466 U.S. at 691-92. To find prejudice, the court must conclude that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. It would be a bizarre doctrine that precluded a finding that a defendant was prejudiced by "unprofessional errors" because no one of them, treated singly, reached the level of defectiveness that *Strickland*

requires. *See Kyles*, 514 U.S. at 433-34, 436-37 (under *Brady*'s materiality test, which mirrors prejudice test of *Strickland*, court is required to assess the effect of suppressed evidence favorable to the defendant "collectively, not item by item.") So of course counsel's errors must be viewed in the aggregate.[11]

C. This Case Is the Appropriate Vehicle For Resolving the Split Among the Circuits On This Crucial Issue.

This case is a singularly suitable one for resolving the conflict among the courts of appeals over the propriety of a cumulative evaluation of counsel's derelictions under *Strickland*. Although the State contended at trial that Johnson actually shot Cantrell, it now concedes that the evidence was not sufficient to convict Johnson as the killer. To convict Johnson of capital murder, therefore, the State had to prove in some other way that Johnson possessed the specific intent to kill Cantrell necessary for conviction. As the district court acknowledged, Johnson's counsel should have recognized the implications of this fact for the conduct of the defense, but did not. (App. B, pp. 144a-45a.)

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[11] *See* 3 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 11.10(c) (2d ed. 1999) ("[W]hile the issues of prejudicial impact and incompetency are separate prongs of the *Strickland* [standard], the potential prejudicial impact of the subject dealt with by counsel reaches over into the competency determination, as that impact obviously relates to the care and effort expected from a competent adversary."); *cf. United States* v. *Cook*, 45 F.3d 388, 394 (10th Cir. 1995) ("*Strickland*'s performance and prejudice prongs 'partially overlap when evaluating the performance of appellate counsel.'") (*quoting Miller* v. *Keaney*, 882 F.2d 1428, 1434 (9th Cir. 1989)).

Counsel's failure of recognition was the source of virtually all the instances of incompetence that led to their client's conviction: the failure to make anything of their knowledge that more than two men were at the Cantrell home; the failure to seize upon Mrs. Cantrell's testimony indicating that their client was a third man, not one of the two original intruders; the failure to argue lack of intent to kill to the jury; the misstatement to the jury that such an intent was not needed; the acquiescence in the prosecutor's statement to the same effect; and the failure to ask that the jury be instructed on felony murder as a rational alternative to capital murder if the jurors thought Johnson lacked an intent to kill.

If cumulative evaluation of counsel's performance is not called for in this case, where virtually all of their questioned acts and omissions had a common source and a common impact in depriving the jury of an opportunity to consider petitioner's only real defense, then such evaluation is not called for in any case.

III. THE ELEVENTH CIRCUIT'S HOLDING THAT THE PRESUMPTION OF A RATIONAL JURY OVERRIDES THE CONSTITUTIONAL RULING OF *BECK* v. *ALABAMA* WARRANTS REVIEW BY THIS COURT

Beck v. *Alabama*, 447 U.S. 626 (1981), holds that a capital murder defendant is entitled, as a matter of law, to have the jury charged on a lesser-included offense — in that case felony murder — if the facts of record would support a guilty verdict on that offense. The Court reasoned that failure to give such a charge impermissibly increases the likelihood of a capital murder conviction. *Id.* at 634-37. "For when the evidence unquestionably establishes that the defendant is guilty of a serious offense — *but leaves some doubt with respect to an element that would justify conviction of a capital offense* — the failure to give the jury the 'third

option' of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction. *Id.* at 637 (emphasis added). "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.*

The district court in this case acknowledged that a felony murder instruction would have fit the facts of the case, and that there was a substantial issue of fact as to Johnson's intent. (App. B, p. 145a.) The Eleventh Circuit did not disagree with these findings, nor did it try to defend the failure to instruct on felony murder. Instead, it held that the failure had not prejudiced Johnson. According to the Eleventh Circuit, "[a] felony murder instruction would not have changed the standard for conviction on capital murder, and so for an objective and rational jury — and we must presume that this was such a jury — an instruction on that offense should not have changed the outcome." (App. A, p. 39a.) This rationale is directly in conflict with the judgment expressed in *Beck* that failure to give the jury a realistic third option to conviction on a capital charge and acquittal is prejudicial as a matter of law because it "would seem inevitably to enhance" the chance of a capital conviction. 447 U.S. at 637.

The ruling below eviscerates *Beck*. Without acknowledging the conflict with this Court's reasoning, the Eleventh Circuit in effect has held that the failure to give a lesser-included charge could *never* constitute a violation of Due Process. In every case in which the failure to give an instruction on a lesser-included offense is raised on appeal, a jury presumed to be rational and objective will have returned a guilty verdict on a higher offense. In no such instance would an instruction on a lesser-included offense have changed the standard for conviction of the higher-degree

crime. The court reached its result by indulging in a presumption as to jury behavior that is unrealistic and is precluded by *Beck*.[12]

The ruling below also distorts *Schad* v. *Arizona*, 501 U.S. 624 (1991). There, the Court held that when more than one lesser-included, non-capital offense fits the facts of record, it is not necessary to charge on both since the necessary third option is afforded by the charge on one. The Court emphasized that its ruling was "not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser-included offense, even one without any support in the evidence." *Id.* at 648. In *Schad*, petitioner had conceded that the evidence would have supported a conviction on the lesser-included charge that was given, "and that is adequate to indicate that the verdict of capital murder represented no impermissible choice." *Id.*

Thus, under *Beck* and *Schad*, a defendant's due process right to a fair trial is protected if, to the extent the facts permit, at least one lesser-included charge is given that "makes sense" in the light of the record, and therefore gives the jury "a real choice" for a third option. *Kilgore* v. *Bowersox*, 124 F. 3d 985, 995 (8th Cir. 1997); *see also Montoya* v. *Collins*, 955 F. 2d 279, 285 (5th Cir. 1995) (charges on lesser-included offenses must "present[] a realistic alternative for the jury").

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[12] We deal with the *Beck* issue in this petition as an issue of due process. No request was made at trial for a felony murder instruction, but there is plainly cause for that lapse in the unexplained failure of counsel to make the request and obvious prejudice to petitioner. The court below focused on the issue primarily as an element of counsel's incompetence, but in either form the underlying issue of whether petitioner was entitled to the instruction is presented.

In dismissing Johnson's claim that a felony murder instruction was necessary on the facts of this case, the court below did not look for lesser-included alternatives that could be said to "make sense," or to present the jury a "realistic" third option. Instead, it simply stated in a footnote, without explanation, that "there was no constitutional violation under *Schad*" because the jury "did receive lesser-included instructions on robbery and intentional murder." (App. A, p. 39a n.15.) Because neither of these two options presented "a real choice," this is a holding that *Beck* would be satisfied by "just any lesser-included offense" that the Court enjoined against in *Schad*. 501 U.S. at 648.

As the trial court itself explained in charging the jury, these two lesser charges permitted the jury to find Johnson "guilty of [intentional] murder" only if it "found it wasn't done during a robbery [or attempted robbery]" or guilty of robbery only if "the robbery was committed but the deceased was not killed." (Tr. at 855.) There simply was never any question that Cantrell was killed and that he was killed during an attempted robbery. Only felony murder would have permitted the jury to find that there had been a robbery attempt in which Johnson had participated, and that that crime had led to a killing in which he had not participated. As the district court found, there was evidence to support such a jury finding. (App. B, p. 145a.) Without a felony murder charge, the jury had no realistic alternative to capital murder. It could not sensibly find that there had been no robbery attempt, nor could it find that Cantrell had not been killed in the shootout, and it also could not sensibly acquit because Johnson had clearly been involved in the robbery attempt. Absent a felony murder charge, the jury had no viable option but to convict Johnson of capital murder.

IV. THE STATE'S SUPPRESSION OF A POLICE REPORT INDICATING THAT TWO OTHER MEN "DID THE SHOOTING" AT THE CANTRELL HOME VIOLATED *BRADY* v. *MARYLAND*

Trial counsel's failure to comprehend and litigate the issue of intent was compounded by the State's failure to turn over to the defense an official Alabama Bureau of Investigation report in which Sergeant Newell, a law enforcement officer who testified at the trial, noted that an informant had told authorities that Garland and Wayne McCulloch "did the shooting" at the Cantrell home. The State's decision to withhold this exculpatory evidence clearly violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), which "requires the prosecution to produce evidence that someone else may have committed the crime." *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984); *see also Banks* v. *Reynolds*, 54 F.3d 1508 (10th Cir. 1995).

The Eleventh Circuit concluded that Johnson was not prejudiced by the State's failure to disclose the ABI Report because the only thing the improperly withheld report did was to "identify[] additional participants in the crime." (App. A, p. 53a.) In identifying two others who "did the shooting," however, the report excluded Johnson as one of the two participants in the killing of Cantrell. By no account were there more than two intruders who fired at Cantrell. The ABI Report also would have provided counsel with critical support in establishing that more than two people were present at the scene or nearby, and thus that proof of Johnson's presence was not proof of his guilt of murder. Because the Eleventh Circuit refused to consider whether counsel's conduct in the aggregate constituted a failure to

litigate the issue of intent, it did not examine the report in this light.[13]

When viewed in the context of Mrs. Cantrell's testimony suggesting strongly that a third man was outside the door to the carport during the shooting, the fact that the weapon found on Johnson matched none of the bullets at the scene, and the jury's 9 to 3 vote against the death penalty, the State's suppression of the ABI Report clearly "undermines confidence" in Johnson's conviction of capital murder. *Kyles*, 514 U.S. at 435.

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[13] The Eleventh Circuit suggested that no *Brady* violation occurred because the ABI Report was not admissible as substantive evidence for the defense. The duty to disclose under *Brady*, however, extends to material that can be used in questioning adverse witnesses. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). An admission by Sgt. Newell that he had information that persons other than Johnson did the shooting could have had substantial impact on the jury.

CONCLUSION

Keith Johnson stands condemned to die, convicted of capital murder by a jury that was effectively denied access to his only real defense and not properly informed of its verdict options. Decisions of this Court designed to guard against such a miscarriage were scanted by the court below. This Court should issue the writ and review that court's decision because of the importance of the questions its decision raises to the administration of the death penalty. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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